

REMARKS/ARGUMENTS

1. The specification and the drawings of the application have been amended to correct errors in numbering of various features. These changes are shown in the attached sheets and merely correlate one part of the application to another. These changes add no new matter to the application and acceptance of these amendments is respectfully requested.
2. A new figure showing a cut away view of the canister containing the pre-filter and the coil has been added as new Fig. 7. This new drawing adds no new matter to the application and acceptance of this new drawing is respectfully requested.
3. The claims of the application have been amended in various ways.
4. Claim 1 of the present application has been amended to include various limitations related to the plenum and the filter that are found in the present invention. Support for these amendments is found on page 12, paragraph 28 and 29, page 13, paragraph 30 and in other locations within the specification. These amendments add no new matter to the specification and acceptance of these amendments is respectfully requested.
5. Claims 2 and 3 of the application have been canceled.
6. Claims 4 and 5 have been amended to more particularly describe the canister that contains the pre-filter and the coiled passageway, which is found in the present invention. Support for these amendments can be found on page 17, paragraph 36 and in other locations throughout the specification. These amendments add no new matter to the application and acceptance of these amendments is respectfully requested.
7. Claim 6 has been canceled.
8. Claim 7 has been amended to include various limitations related to the configuration of the artificial rock, which is present in the present invention. Support for this amendment is found on page 20, paragraph 41. This amendment adds no new matter to the application and acceptance of this amendment is respectfully requested.
9. Claim 10 has been amended to include various further limitations regarding the placement of fiber optic lighting within the artificial rock. Support for this amendment is found on page 21, paragraph 43.
10. Claims 11-14 are withdrawn from consideration.
11. New claims 15-17 have been added.
12. New claim 15 includes various limitations related to the structure of the pond liner of the present invention. Support for these amendments is found on page 9, paragraph 22 of the present application. These amendments add no new matter to the specification and acceptance of these amendments is respectfully requested.

13. New claim 16 adds additional limitations to the pond liner described in new claim 15. Support for these additional limitations are found on page 10, paragraph 24 of the application as filed. This amendment adds no new matter to the application and acceptance of these amendments is respectfully requested.

14. New claim 17 adds additional limitations to the shredded frass filter media, which is described in claim 1. Support for this amendment is found on pages 13-15, paragraphs 31-33. These amendments add no new matter to the specification and acceptance of these amendments is respectfully requested.

Standards for Patentability

15. "An applicant for a patent is entitled to the patent unless the application fails to meet the requirements established by law. It is the Commissioner's duty (acting through the examining officials) to determine that all requirements of the Patent Act are met. The burden is on the Commissioner to establish that the applicant is not entitled under the law to a patent In rejecting an application, factual determinations by the PTO must be based on a preponderance of the evidence, and legal conclusions must be correct." *In re Oetiker*, 977 F.2d 1443, 1449, 24 USPQ2d 1443, 1447,24 USPQ2d at 1447 (Fed. Cir. 1992) (Judge Plager concurring).

16. "The precise language of 35 USC §102 that 'a person shall be entitled to a patent unless,' concerning novelty and unobviousness, clearly places a burden of proof on the Patent Office which requires it to produce the factual basis for its rejection of an application under sections 102 and 103." *In re Warner*, 379 F.2d 1011, 1016, 154 USPQ 173 (CCPA 1967), cert. denied, 389 U.S. 1057, reh'g denied, 390 U.S. 1000 (1968).

Claim Rejections - 35 USC §102

17. The Examiner rejected claim 1 of the application as filed, under §102(b) as being anticipated by Porter.

18. "A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described in a single prior art reference." *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d. 628, 631, 2 USPQ2d 1051, 1053 (Fed. Cir. 1987). "The identical invention must be shown in as complete detail as contained in the . . . claim." *Richardson v. Suzuki Motor Co.*, 828 F.2d 1226,1236, 9 USPQ2d 1913, 1920 (Fed. Cir. 1989). MPEP §2131.

19. Claim 1 has been amended to include a variety of limitations that do not exist in the Porter reference. These include the limitations that the plenum is made from a semi-rigid material and having a fixed size configured to fit within the liner, that the plenum configured to receive water from a pump and to hold water in a pressurized state so as to provide a reservoir of pressurized water to a pond located above said plenum, and that the underwater filter is adapted to fit within said plenum, and defines a plurality of interconnected chambers, each of said interconnected chambers filled with a shredded plastic frass filtering media. In addition, claim 1 has been amended to include the additional features of a pump, a pre-filter, and a skimmer all interconnected to the plenum and configured to circulate water through the plenum.

20. The Porter reference that has been cited by the Examiner does not include any of these features. For this reason, the Porter reference does not anticipate this now amended claim or any of the other claims that depend therefrom. In view of these amendments and remarks, Applicant respectfully requests that the Examiner's rejection of these claims be withdrawn.

Claim Rejections - 35 USC § 103

21. The Examiner rejected claims 2-5 and 7-10 under §103(a) as being unpatentable (obvious) in view of Porter.

22. "To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art and not based on the applicant's disclosure. *In re Vaeck*, 947 F.2d 488, 20 USPQ2d 1438 (Fed. Cir. 1991)." MPEP § 706.02(j).

23. The law regarding obviousness is clear -- any modification of the prior art must be suggested or motivated by the prior art:

'Obviousness cannot be established by combining the teachings of the prior art to produce the claimed invention, absent some teaching or suggestion supporting the combination. Under section 103, teachings of references can be combined only if there is some suggestion or incentive to do so.' [citation omitted] Although couched in terms of combined teachings found in the prior art, the same inquiry must be carried out in the context of a purported obvious "modification" of the prior art. The mere fact that the prior art may be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggested the desirability of the modification.

In re Fitch, 972 F.2d 1260, 23 USPQ2d 1780, 1783-4 (Fed.Cir. 1992), (in part quoting from *ACS Hospital Systems, Inc. v. Montefiore Hospital*, 732 F.2d 1572, 1577, 221 USPQ 929, 933 (Fed. Cir. 1984)).

24. The Examiner must prove motivation to modify the Porter reference so as to arrive at the combination, which is set forth and claimed in the present invention. *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1352 (Fed. Cir. 1998) (describing "teaching or suggestion or motivation [to combine]" as an "essential evidentiary component of an obviousness holding"), see also *In re Rouffet*, 149 F.3d 1350, 1359 (Fed. Cir. 1998) ("the Board must identify specifically...the reasons one or ordinary skill in the art would have been motivated to select the references and combine them").

We have noted that evidence of a suggestion, teaching, or motivation to combine may flow from the prior art references themselves, the knowledge of one of

ordinary skill in the art, or, in some cases, from the nature of the problem to be solved, although “the suggestion more often comes from the teachings of the pertinent references ...” The range of sources available, however, does not diminish the requirement for actual evidence. That is, the showing must be clear and particular. Broad conclusionary statements regarding the teaching of multiple references, standing alone, are not “evidence.”

In re Dembiczaik, 175 F.3d 994, 999 (Fed. Cir. 1999).

25. Applicant respectfully suggests that the Examiner has failed in this case to appropriately show any motivation on the part of a person skill in the art to make the modifications that the Examiner has suggested would be obvious, this is particularly true in view of the amendments that the Applicant has made to the Application.

26. The Porter reference does not teach or describe a plenum as has been described in the present invention nor does the Porter reference teach the use or utility of such a device. Similarly, the Porter reference fails to teach a filter such as the type that is taught in the present application. Without the teachings related to these key features the present invention cannot be considered an obvious modification of the Porter reference.

27. The Examiner has repeatedly stated that the features that are not present in the Porter device are merely design choices and as a result, the present invention is not patentable over the prior art. However, the MPEP states that a *prima facie* case of obviousness must come from the Examiner and must be supported by evidence.

28. The Examiner has simply stated that the features that are found in the claims of the present invention do not produce any unexpected result and as a result, the claims are obvious and unpatentable. Applicant respectfully submits that to reach these conclusions that the Examiner has improperly placed the burden of production and persuasion of patentability upon the Applicant, has improperly utilized hindsight reasoning and has failed to make and support his finding of a *prima facie* case of obviousness.

29. The Examiner has rejected the claims of the application on the grounds that the limitations cited in the claims of the application are mere design choices, and that the Applicant has failed to provide a proper showing of any unexpected result. Applicant respectfully submits that this is not the burden that belongs to the Applicant. As the law above clearly indicates, the presumption of allowability belongs to the Applicant upon the filing of the application and the burden of producing persuasive evidence to the contrary belongs to the Patent Office. If the Examiner at the Patent Office brings forth sufficient evidence so as to support a rejection of these claims, then the burden of production and persuasion falls back upon the Applicant.

30. In this case, Applicant submits that the Examiner has not met his burden of producing sufficient evidence to support a *prima facie* case of obviousness. The Examiner has not produced any evidence of a suggestion or motivation to combine the references so as to arrive at the combination that exists in the claims as they have been amended.

31. In as much as no such suggestion or motivation can be found in the references

themselves, Applicant respectfully submits that the only suggestion or motivation that can be made to combine or modify features of the prior art to arrive at the combination that has been claimed by the Applicant, has come from the Applicant's own application.

32. To draw on hindsight knowledge of the patented invention, when the prior art does not contain or suggest that knowledge, is to use the invention as a template for its own reconstruction -- an illogical and inappropriate process by which to determine patentability. *W.L. Gore & Assoc. v. Garlock, Inc.* 721 F.2d 1132, 1138, 220 USPQ 303, 312-13 (Fed. Cir. 1983). The invention must be viewed not after the blueprint has been drawn by the inventor, but as it would have been perceived in the state of the art that existed at the time the invention was made. *Interconnect Planning Corp. v. Feil*, 774 F.2d 1132, 1138, 227 USPQ 543, 547 (Fed. Cir. 1985).

33. In determining the scope and content of the prior art, and determining whether the prior art suggested the claimed invention, the references "must be read as a whole and consideration must be given where the references diverge and teach away from the claimed invention." *Akzo N.V. v. United States Int'l Trade Commission*, 808 F.2d 1471, 1 USPQ2d 1241 (Fed. Cir. 1986); *Panduit Corp. v. Dennison Mfg. Co.*, 1 USPQ2d 1593 (Fed. Cir. 1987).

34. The Porter reference teaches a significantly different device than the device that is described in the present application. The Porter reference does not teach the presence of a plenum that lies beneath the surface of the pond and provides a source of pressurized water into the pond. The Porter reference merely refers to a skimmer and filter device that acts to feed material into a recirculating pump. The Porter reference makes no teaching or reference to structure, organization or layout of the filtration and pressurized plenum system, which is shown in the present invention. As such the present invention cannot be considered to be an obvious modification of the Porter reference.

New Claims 15, 16, 17

35. Applicant has added new claims 15, 16, and 17. These claims add no new matter to the specification and merely act to further characterize additional novel features of the present invention.

36. Claim 15 adds the additional new limitation that the preformed pond liner is made from a green UV stabilized plastic material that is formulated to provide protection against various forms of plastic oxidation and breakdown, including free-light radicals and hindered amines. Support for this amendment can be found on page 9, paragraph 22 of the application as filed.

36. Claim 16 adds the additional limitation that the preformed pond liner has a thickness of approximately 3/8 of an inch. Support for this amendment can be found on page 10, column 24 of the application as filed.

37. Claim 17 adds the limitation that the shredded plastic frass filter media is a plurality of shredded folded plastic bottle portions having a relatively light weight, a desired static charge, generally flat surface area portions to allow colonization of bacteria thereupon and sharp edge portions configured to mechanically cut and grind algae within the decorative pond system. Support for this amendment is found on pages 13-15, paragraphs 31-33.

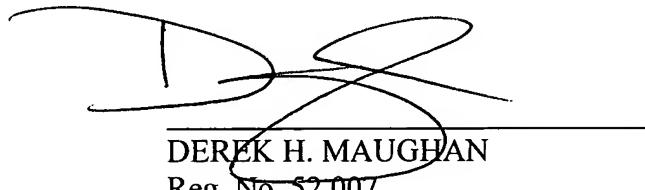
Conclusion

If the Examiner feels it would advance the application to allowance or final rejection, the Examiner is invited to telephone the undersigned at the number given below.

Reconsideration and allowance of the application as amended is respectfully requested.

DATED this 8th day of May, 2006

Very respectfully,



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CERTIFICATE OF MAILING

I HEREBY CERTIFY that this correspondence is being deposited with the United States Postal Service on the below date as first class mail in an envelope addressed to:

Mail Stop Amendment
Commissioner for Patents
PO Box 1450
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DATE: May 8, 2006


Amanda L. Mullins

Amendments to the Drawings:

The attached sheet of drawings includes changes to Fig. 3. This sheet includes Fig. 3, which replaces the original sheet including Fig. 3.

The attached sheet of drawings includes changes to Fig. 5. This sheet includes Fig. 5, which replaces the original sheet including Fig. 5.

The attached sheet of drawings includes new Fig. 7. This sheet includes Fig. 7.

Attachment: Replacement Sheets and new sheet